BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID HEDBERG	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,308
GAINEY TRANSPORTATION SERVICES	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF	)	
THE STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the August 13, 2008, Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant alleges he injured his left shoulder, neck and chest on October 4, 2005, when a gust of wind caught the trailer door he was holding. At claimant's August 2008 preliminary hearing, claimant requested the medical treatment that had been recommended by Dr. P. Brent Koprivica. The parties agreed claimant's accident and resulting injuries arose out of and in the course of his employment with respondent. Respondent, however, challenged that claimant provided it with timely written claim.

In the August 13, 2008, Order, Judge Moore ordered an independent medical evaluation. The Judge did not address written claim in the Order. But at the conclusion of the preliminary hearing, the Judge ruled that a particular document (a December 19, 2005, letter from respondent that claimant signed and returned to respondent) satisfied the requirement of timely written claim found in K.S.A. 44-520a.

Respondent contends Judge Moore erred. It first argues written claim was not received until January 16, 2008, when claimant filed a written claim for compensation and his notice of hearing. At the preliminary hearing respondent argued claimant had one year from August 29, 2006, which was the last date respondent allegedly provided medical treatment, to serve his written claim for workers compensation benefits but failed to do so.

Respondent also argued the December 19, 2005, letter did not comprise a claim for workers compensation benefits as the letter did not *demand* benefits. In short, respondent requests the Board to reverse the preliminary hearing Order and deny claimant's request for medical treatment.

Conversely, claimant contends the preliminary hearing Order should be affirmed. He argues the December 19, 2005, letter comprised written claim and was received well within the required period for serving written claim. Claimant contends any written document may comprise written claim as long as the document indicates a worker's intent to pursue benefits. Claimant argues, in part:

> Mr. Hedberg signed the [December 19, 2005] letter indicating that "yes" he would accept the light duty employment that was being offered to him as an accommodation and in accordance with his rights and benefits under the workers compensation statutes. Clearly, that acceptance notified the employer that he did intend to pursue his rights and benefits under the Kansas Workers' Compensation Law including the continuation of his medical care, as well as, his desire to continue to work in an accommodated capacity. Further, by Mr. Hedberg's signature on that letter, he acknowledged his receipt of information that his workers' compensation claim was being handled by Connie Gill at Fara Insurance Services and he was to contact her for an explanation regarding his eligibility for workers' compensation benefits.[1]

The only issue before the Board on this appeal is whether claimant provided respondent with timely written claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds and concludes:

Claimant, who is a truck driver, was injured while working for respondent on October 4, 2005. The parties stipulated claimant's accident arose out of and in the course of his employment with respondent. At this juncture, the only issue is whether claimant gave respondent a timely written claim for workers compensation benefits.

Because the accident occurred during respondent's busiest time of the year, claimant delayed seeking medical treatment until early December 2005. While taking his prescribed medications, claimant was restricted from driving.

[1] Claimant's Brief at 3, 4 (filed Sept. 15, 2008).

Respondent sent claimant a letter dated December 19, 2005, offering him light duty work at respondent's Kansas City, Kansas, terminal. The letter asked claimant to sign and return it if he agreed to its terms. The letter read, in pertinent part:

> Per medical advice from the Concentra Medical Center, you are able to perform light duty work. The restrictions imposed by Dr. Temesgen Wakwaya are " . . . no driving while on meds."
>
> As a result, you are able to perform light duty work at the Kansas City terminal. As directed by Mr. David Gastl or Ms. Rosemary Masters, you will be performing any number of clerical/office related tasks.
>
> This is a position that you will be paid $6.00 per hour. Please contact Connie Gill at FARA Insurance Services . . . and she will explain your eligibility for worker's compensation benefits, the weekly amount involved, etc.
>
> This light duty position will continue for as long as Dr. Wakwaya determines you are unable to resume your regular driving duties.[2]

Claimant testified he accepted the light duty position, signed the letter, and returned it to respondent. At the preliminary hearing, claimant indicated that by signing and returning the letter he intended to notify respondent of his intent to pursue workers compensation benefits, including medical treatment, for his October 2005 accident.

Claimant's employment with respondent ended July 31, 2006.

After treating at Concentra Medical Center for a period of time, claimant was referred to a specialist, who had claimant undergo an MRI and physical therapy. The last date claimant received authorized medical treatment was August 29, 2006. Claimant's medical case manager told claimant respondent would contact him in approximately 10 days or two weeks regarding what would happen next. But claimant was never contacted. There is nothing in the record to indicate respondent ever advised claimant it would not provide claimant with additional medical treatment.

Since August 29, 2006, claimant has sought medical treatment from his personal physician, who has prescribed Lortab. At the August 2008 preliminary hearing, claimant was continuing to take that medication on a daily basis.

[2] P.H. Trans., Cl. Ex. 3.

In addition to providing an employer with notice of an accident, an injured worker must also give his or her employer a written claim for benefits. The written claim statute, K.S.A. 44-520a, provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

And under certain circumstances, the time period for serving written claim upon the employer may be extended to one year.[3]

The Kansas Supreme Court has stated the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[4] The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.[5] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*,[6] the Kansas Supreme Court described the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

Moreover, in *Klein*[7] the Kansas Supreme Court commented:

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[3] See K.S.A. 44-557.

[4] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[5] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[6] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

[7] *Klein v. McCullough,* 135 Kan. 593, 597, 11 P.2d 983 (1932).

> This court is grateful to the legislature for the enactment of section 20 of the present statute, which emancipated the bench and bar, and the compensation commission as well, from the mess we were in touching the requirements of notice and demand and how they might be waived where no prejudice was shown – not to speak of our more or less constant distrust that such waivers were largely established by interested and questionable testimony. This court is not disposed to open another such Pandora's box of trouble by conceding that the plain letter of the statute can be circumvented by oral testimony to show a waiver of its requirement. That requirement is a very simple one. Any workman, however limited his learning, can conform to it. Almost any sort of writing which can be fairly interpreted as a written demand for compensation . . . or which the employer himself has so interpreted . . . will satisfy the statute . . . .

Whether a document, which need not be in any particular form, comprises a written claim is primarily a question of fact.[8] "The written claim may be presented in any manner and through any person or agency."[9] And the relevant question is whether the worker intended to *ask* the employer for compensation.[10]

As indicated above, respondent contends the December 19, 2005, letter cannot satisfy the written claim requirement as claimant did not *demand* workers compensation benefits. The undersigned disagrees. As indicated in *Ours* and *Fitzwater*, the test of whether a document constitutes written claim is whether the worker intended to ask for compensation when the document was signed or presented.

The undersigned affirms Judge Moore's finding that the December 19, 2005, letter constituted written claim. When claimant signed and returned the letter he had been restricted from performing his regular driving job and he needed additional medical care. Moreover, claimant was facing a significant reduction in his weekly wages as the accommodated job paid only $6.00 per hour as compared to the $675 to $700 per week he normally earned.[11] In short, claimant's circumstances were such that it would be beneficial to him to seek workers compensation benefits for his injuries. Moreover, the letter itself referred to workers compensation benefits and claimant testified he intended for the letter to inform respondent he was seeking those benefits. And that testimony is credible.

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[8] *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

[9] *Id.*, Syl. ¶ 4.

[10] *Id.*, Syl. ¶ 2.

[11] At page 6 of the preliminary hearing transcript, the parties represented claimant's average weekly wage was in the range of $675 to $700.

In conclusion, the undersigned finds and concludes claimant provided respondent with written claim well within the 200-day period provided by the claim statute. Consequently, the August 13, 2008, Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the August 13, 2008, Order entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of October, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Steffanie L. Stracke, Attorney for Claimant
M. Shannon Schulte, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[12] K.S.A. 44-534a.